

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GLENN K. MIZUKAMI,) CIVIL NO. 09-00572 DAE-KSC
vs. Plaintiff,)
vs.) FINDINGS AND
vs.) RECOMMENDATION TO DISMISS
vs.) THE COMPLAINT WITHOUT
vs.) PREJUDICE AND TO DENY AS
vs.) MOOT PLAINTIFF'S
vs.) APPLICATION TO PROCEED IN
vs.) FORMA PAUPERIS
vs.)
vs.)
Defendants.)
_____)

FINDINGS AND RECOMMENDATION TO DISMISS THE COMPLAINT
WITHOUT PREJUDICE AND TO DENY AS MOOT PLAINTIFF'S
APPLICATION TO PROCEED IN FORMA PAUPERIS

On December 4, 2009, Plaintiff Glenn Mizukami ("Plaintiff"), proceeding *pro se*, commenced the instant action and filed an Application to Proceed In Forma Pauperis ("Application").

Pursuant to Local Rule 7.2(d) of the Local Rules of Practice of the United States District Court for the District of Hawaii ("Local Rules"), the Court finds this matter suitable for disposition without a hearing. After careful consideration of Plaintiff's Application, the Court HEREBY RECOMMENDS dismissal of

the Complaint with leave to amend and DENIES AS MOOT Plaintiff's Application for the reasons set forth below.

BACKGROUND

In his Complaint, Plaintiff alleges that Defendant Donna Edwards, his ex wife, and Defendant Thomas Collins, III, her attorney, conspired to deceive the state courts and deprive Plaintiff of equal protection of the laws pursuant to 42 U.S.C. §§ 1985 and 1986. He alternatively seeks relief "on Fed.R.Civ.P. Rule 8(a)(3) to remedy the Defendants' Torts & wrongdoings from Rule 60(b) Frauds-on-the-Courts Hazel-Atlas v. Hartford Empire, 1944, 64 S.Ct. 997; Wright & Miller Rule 60(b) & Others." Compl. at ¶ 6.

DISCUSSION

Plaintiff requests that the Court permit him to proceed *in forma pauperis*. A court may authorize the commencement or prosecution of any suit without prepayment of fees by a person who submits an affidavit that the person is unable to pay such fees. 28 U.S.C.

§ 1915(a)(1). “[A]n affidavit is sufficient which states that one cannot because of his poverty pay or give security for the costs and still be able to provide himself and dependents with the necessities of life.” Adkins v. E.I. Du Pont De Nemours & Co., Inc., 335 U.S. 331, 339 (1948) (internal quotations omitted). However, a court may deny leave to proceed in forma pauperis at the outset and dismiss the complaint if it appears from the face of the proposed complaint that the action is frivolous, that the action fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2); see Tripati v. First Nat. Bank & Trust, 821 F.2d 1368, 1370 (9th Cir. 1987); Minetti v. Port of Seattle, 152 F.3d 1113, 1115 (9th Cir. 1998). A complaint is frivolous if “it has no arguable substance of law or fact.” Tripati, 821 F.2d at 1370 (citations omitted); Neitzke v. Williams, 490 U.S. 319, 325 (1989). The term frivolous “embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.” Id.

If the court dismisses the complaint, it should grant leave to amend even if no request to amend the pleading was made, unless the court determines that the pleading could not possibly be cured by the allegation of other facts. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000); see also Tripati, 821 F.2d at 1370. Specifically, "pro se plaintiffs proceeding in forma pauperis must also be given an opportunity to amend their complaint unless it is 'absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" Id. (quoting Franklin v. Murphy, 745 F.2d 1221, 1228 n.9 (9th Cir. 1984)).

In the present case, the Court is unable to ascertain whether Plaintiff has a cognizable claim. Rule 8 of the Federal Rules of Civil Procedure ("FRCP") requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair notice and state the elements of the claim plainly and succinctly. Jones v. Cmty. Redev. Agency, 733 F.2d

646, 649 (9th Cir. 1984). "The Federal Rules require that averments 'be simple, concise and direct.'"

McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996) (quoting Fed. R. Civ. P. 8(e)(1)). Simply put, "[a]ll that is required [by Fed. R. Civ. P. 8(a)] is that the complaint gives 'the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests.'" Kimes v. Stone, 84 F.3d 1121, 1129 (9th Cir. 1996) (quoting Datagate, Inc. v. Hewlett-Packard Co., 941 F.2d 864, 870 (9th Cir. 1991)). A complaint having the factual elements of a cause of action scattered throughout the complaint and not organized into a "short and plain statement of the claim" may be dismissed for failure to satisfy Rule 8(a). See Sparling v. Hoffman Constr. Co., 864 F.2d 635, 640 (9th Cir. 1988); see also McHenry, 84 F.3d 1172.

Here, the Complaint is largely incomprehensible, but appears to seek redress for Defendants' conduct related to state family court proceedings. Because Plaintiff has failed to comply with Rule 8, the Court is unable to determine whether

his claims are cognizable. Plaintiff cites 42 U.S.C. §§ 1985 and 1986 as the primary statutory authority upon which he bases his claims. However, it should be noted that absent allegations to support a § 1983 violation, Plaintiff's § 1985 and § 1986 claims would be precluded. Dooley v. Reiss, 736 F.2d 1392, 1395 (9th Cir. 1984), cert. denied 469 U.S. 1038 (1984) (absence of § 1983 deprivation implies a failure to state a conspiracy claim); Cassettari v. Nevada County, Cal., 824 F.2d 735, 739 (9th Cir. 1987). Plaintiff has not alleged that Defendants violated § 1983, and it does not appear that he could because Defendants would not have acted under color of state law as a private attorney and as his ex wife.

For these reasons, the Court finds that the Complaint is frivolous and fails to state a claim on which relief may be granted. The Court therefore recommends dismissal of the Complaint pursuant to 28 U.S.C. § 1915. See Denton v. Hernandez, 504 U.S. 25, 32 (1992) (quoting Neitzke, 490 U.S. at 327) (stating that the in forma pauperis statute "accords judges not

only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless").

Insofar as the Court recommends that the district court dismiss the Complaint, Plaintiff's IFP Application is moot. Even if it were not moot, the IFP Application would be denied because Plaintiff has failed to allege facts that would support a finding of poverty with any degree of certainty. United States v. McQuade, 647 F.2d 938, 940 (9th Cir. 1981) (quoting Jefferson v. United States, 277 F.2d 723, 725 (9th Cir. 1960)) (noting that applicants under § 1915 must demonstrate their poverty with "some particularity, definiteness and certainty").

Plaintiff's Application is incomplete. He has indicated that he has received income totaling \$27,200 in the past 12 months. He also represents that his mortgage, insurance, taxes, and expenses totaled \$41,000. However, he has failed to describe with

sufficient detail the amounts of his monthly expenses and the amounts owed and to whom they are payable. See AO 240 Application to Proceed in District Without Prepaying Fees or Costs (Short Form), ¶¶ 6 & 8.

Without a complete picture of Plaintiff's financial situation, the Court is not in a position to grant IFP status. Plaintiff's approximate annual income of \$27,200 surpasses the poverty threshold for a single individual in Hawaii, which is currently \$12,460. Annual Update of the HHS Poverty Guidelines, 74 Fed. Reg. 4199-04 (Jan. 23, 2009). Moreover, he has a substantial and valuable asset in his house. Based on the information currently before the Court, the Court cannot find that Plaintiff is unable to pay the filing fee. Until Plaintiff meets his burden of demonstrating that because of his poverty he is unable to pay the filing fee, his Application must be denied.

The Court recommends that the district court permit Plaintiff to file an amended complaint, addressing the deficiencies identified above, within thirty (30) days of the date this Findings and

Recommendation is acted upon. In addition, the Court recommends that Plaintiff be permitted to file a renewed application to proceed in forma pauperis.¹ At minimum, any renewed application should include specific details about Plaintiff's purported debt, mortgage and/or other payments, and expenses, along with the other information requested in the form Application.

CONCLUSION

In accordance with the foregoing, the Court makes the following recommendations:

- 1) DISMISS the Complaint without prejudice;
- 2) grant Plaintiff thirty (30) days from the date this Findings and Recommendation is acted upon to amend his Complaint;
- 3) failure to either amend the Complaint or pay the filing fee or another IFP Application

¹ Plaintiff is advised to utilize the standardized Application to Proceed Without Prepaying Fees or Costs (Short Form), which is available through this district court's website, and respond fully to all questions therein, to ensure that he provides the Court with all necessary information.

within the time ordered by the Court will result in the automatic dismissal of the action;

- 4) DENY AS MOOT Plaintiff's IFP Application.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, December 29, 2009.





Kevin S.C. Chang
United States Magistrate Judge

CV 09-00572 DAE-KSC; MIZUKAMI V. EDWARDS, ET AL.; FINDINGS AND RECOMMENDATION TO DISMISS THE COMPLAINT WITHOUT PREJUDICE AND TO DENY AS MOOT PLAINTIFF'S APPLICATION TO PROCEED IN FORMA PAUPERIS